MOTION FILED

No. 79-1423

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,

*Appellant,*

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

*Appellee.*

**On Appeal From the Court of Appeal Second Appellate District, State of California**

## MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF APPELLEE

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE

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The American Council of Life Insurance (the "Council") hereby moves, pursuant to Rule 36.3 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. The appellee has consented to the filing of such a brief. The appellant has refused consent.

As described in the brief (*infra*, pp. 1, 2), the Council is a trade association consisting of 509 life insurance companies including most of the major life insurers in the United States. Its members, collectively, have in force approximately 95% of the life insurance written in the United States and 95% of the

life insurance written in California. Many of its members are required to pay retaliatory taxes, such as the tax involved in this case, in California and elsewhere. Most of its members are the beneficiaries of the protection provided by their own state's retaliatory tax and all of its members are beneficiaries of the relatively uniform system of state insurance premiums taxation fostered thereby.

Because the Council has a nationwide constituency, it is peculiarly able to present to the Court the views of the life insurance industry regarding the retaliatory tax statutes in effect in California and 46 other states. The Council and its membership are particularly concerned that neither the parties, on the one hand, nor *amici* on behalf of appellant, Life Insurance Council of New York[1] and the United States, on the other, have addressed or will address certain facts and arguments. Most important among these omissions are those arguments which show why, on a national scale, the retaliatory statutes of California and other states represent a valid and useful element in the nation's scheme of taxation of insurance companies. The Council also wishes to advance the proposition, not presented by the parties, that the McCarran Act, 59 Stat. 33, 15 U.S.C. §§1011-1015, gives a Congressional imprimatur of rationality to the classifications drawn by the California statute.

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[1] Consent for filing the brief *amicus curiae* of the Life Insurance Council of New York was granted by both appellant and appellee.

For these reasons, the motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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## BRIEF *AMICUS CURIAE* OF AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF APPELLEE

---

## INTEREST OF *AMICUS CURIAE*

The American Council of Life Insurance is a trade association consisting of 509 life insurance companies including most of the major life insurers in the United States. Its members, collectively, have in force approximately 95% of the life insurance written in the United States and 95% of the life insurance written in California.

Many of its members are required to pay retaliatory taxes, such as the tax involved in this case, in California and elsewhere. Most of its members are the beneficiaries of the protection provided by their own state's retaliatory tax law, and all of its members are beneficiaries of the relatively uniform

system of state insurance premiums taxation fostered thereby. This brief is devoted solely to the retaliatory tax issue; it urges the affirmance of the judgment of the court below.

## STATEMENT

This case involves California's so-called "retaliatory" tax imposed, in this instance, on premiums collected by an insurance company incorporated in the State of Ohio. California Ins. Code, Section 685.

Retaliatory taxes, in some form, exist in at least 47 states (J.A. at 82). The California retaliatory tax applies only to insurers incorporated in the 17 states which place higher tax burdens upon California insurers than those imposed by California (Brief for Appellant at 13). It does not apply to insurers from California or the 32 states which do not impose taxes on California insurers more burdensome than those imposed by California. Where applicable, the retaliatory tax exacts, in the aggregate, the same taxes and fees from out-of-state insurers that their states of incorporation exact from California insurers.

Appellant, an Ohio corporation, was admitted to do business in California in 1956 under a conditional Certificate of Authority of indefinite term (J.A. at 4, 43). That certificate is expressly conditioned upon compliance by appellant with applicable laws and requirements as such laws are in effect or as they may be amended or changed (J.A. at 43).

Appellant is subject to the California retaliatory tax because Ohio, its state of incorporation, exacts from California insurers taxes and fees more onerous than those California would exact from Ohio insurers but for the retaliatory law. Appellant complains that this exaction (1) interferes with the power Congress has over interstate commerce, U.S. Constitution, Art. I, Sec. 8, cl. 3, and (2) denies it the equal protection of the laws by discriminating against it without a rational basis. The California Court of Appeal, Second Appellate District, from which this appeal is taken, disagreed with appellant on both points.

## SUMMARY OF ARGUMENT

### I.

The California retaliatory tax cannot violate the commerce clause, either in letter or in spirit. Congress, in the exercise of its power to regulate commerce among the several states, may not only promote such commerce but may constrict or entirely prohibit it. It may exercise its power itself or in coordination with the states. *Lewis v. BT Investment Managers, Inc.*, No. 79-45, decided June 9, 1980; *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 434. Through the McCarran Act, 59 Stat. 33, 15 U.S.C. §§ 1011-1015, Congress exercised, in complete coordination with the states, its power to regulate and tax the business of insurance. *Prudential Ins. Co. v. Benjamin,* 328 U.S. at 434-436. Therefore, whether or not an insurance retaliatory tax actually discriminates, it is impervious to a commerce clause attack. *Prudential Ins. Co. v. Benjamin,* 328 U.S. at 436; *Prudential Ins. Co. v. Hobbs,* 328 U.S. 822, *reh. denied,* 329 U.S. 819 (insurance retaliatory tax).

### II.

Since Congress, through the McCarran Act, has acted to sustain and reinforce California's insurance retaliatory tax by the exercise of all the remaining legislative power residing in our federal system, explicit and compelling constitutional infirmity must be found before this joint federal-state effort can be invalidated. *Prudential Ins. Co. v. Benjamin,* 328 U.S. at 436. Such explicit and compelling infirmity cannot be found by resort to the equal protection clause of the Fourteenth Amendment.

First, appellant was not admitted to do business in California under an *unequivocal* license; it was admitted under a *conditional* license of indefinite term (J.A. at 43). Because payment of the tax at issue here is necessary to fulfill a condition to which appellant agreed to be bound upon initial entry and is required for the retention of its license, such payment constitutes a continuing condition of admission,

regardless of the term of appellant's license to do business. *Western & Southern Life Ins. Co. v. State Bd. of Equalization,* 4 Cal.App.3d. 21, 31, 84 Cal.Rptr. 88, 94-95 (1970); *see Lincoln Life Ins. Co. v. Read,* 325 U.S. 673; *Philadelphia Fire Ass'n v. New York,* 119 U.S. 110. It has long been established that the equal protection clause permits a state to discriminate against foreign corporations by imposing upon them more onerous conditions of admission than it imposes upon domestic companies. *Asbury Hospital v. Cass County,* 326 U.S. 207, 212; *Lincoln Life Ins. Co. v. Read,* 325 U.S. 673, 677-678; *Hanover Fire Ins. Co. v. Harding,* 272 U.S. 494, 510-511; *Philadelphia Fire Ass'n v. New York,* 119 U.S. 110. *Philadelphia Fire Ass'n v. New York, supra,* explicitly held that equal protection would not be offended by a foreign corporation's compliance with a retaliatory insurance tax (substantially identical to the tax at issue here) triggered *after* the foreign corporation's admission to do business in the retaliatory state. Unless *Philadelphia Fire Ass'n v. New York* is to be overruled and *Lincoln Life Ins. Co. v. Read* ignored, the equal protection clause does not forbid California to collect its retaliatory tax from appellant.

Second, the California retaliatory tax is not susceptible to attack on equal protection grounds because the classifications it draws are reasonable. Because of a state's broad discretion in making classifications, particularly in taxing statutes, and because of this Court's natural reticence to sit as a "super-legislature," it is appellant's burden to negative every conceivable basis which might support the classifications drawn by the California tax. *See, e.g., Madden v. Kentucky,* 309 U.S. 83, 88. Appellant has not carried its burden. Its argument that a classification scheme in a state taxing statute based solely on a corporation's state of incorporation is virtually a *per se* equal protection violation is not only wrong, *Allied Stores of Ohio v. Bowers,* 358 U.S. 522; *Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S. 580, it is also irrelevant. California's retaliatory tax discriminates against only those corporations from the 17 states who levy insurance premiums taxes against California corporations at a rate in excess of California's (Brief for Appellant at 13). It has no present effect on foreign corporations from 32 other states.

The reason California's tax does not discriminate against *all* foreign corporations (such as the taxes struck down in *WHYY, Inc. v. Glassboro,* 393 U.S. 117, *Wheeling Steel Corp. v. Glander,* 337 U.S. 562, *Southern Ry. v. Greene,* 216 U.S. 400, and other cases cited in appellant's support) is the same reason that the classifications drawn by the tax are rational: the purpose of the tax is to induce states not to tax California insurers more than, in the absence of the retaliatory tax, California would tax their insurers. *E.g., Western & Southern Life Ins. Co. v. State Bd. of Equalization,* 4 Cal.App.3d 21, 34, 84 Cal.Rptr. 88, 96 (1970); In re *Insurance Tax Cases, Aetna Ins. Co. v. Hobbs,* 160 Kan. 300, 161 P.2d 726, 730 (1945), *aff'd sub nom. Prudential Ins. Co. v. Hobbs,* 328 U.S. 822 (*per curiam*). Given this legitimate goal of seeking comity, it would be irrational for California *not* to discriminate as it does.

California's classification scheme is no different than a number of similar discriminatory classifications inherent in a variety of other reciprocating retaliatory and reciprocal statutes. This essential, widespread and hitherto acceptable form of interstate cooperation is one of the few methods of achieving relative national uniformity of state legislation, where appropriate, without resorting to the time-consuming complexity of fashioning and adopting uniform laws or interstate compacts or attracting detailed federal involvement. Because Congress itself, through the McCarran Act, has given the retaliatory tax an imprimatur of rationality, this Court should refrain from renting this tightly woven fabric of interstate cooperation for the sake of plucking from the Fourteenth Amendment a federal "system of delusive exactness" and imposing it where it does not belong.

## ARGUMENT

### I. The California Retaliatory Tax Does Not Interfere with the Power of Congress to Regulate Interstate Commerce Since Congress Has Exercised That Power by Authorizing the Tax.

There can be no mistaking the lesson of *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408. The power of Congress to grant

protection to interstate commerce against state regulation or taxation or to withhold such protection is complete. The determination of policy made by Congress must prevail. *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 456. Congress may not only promote interstate commerce, it may prohibit it entirely or adopt restrictions thereon between either extreme. Nothing (outside of explicit provisions such as are contained in Art. I, § 9 of the Constitution) forbids Congress from discriminating against interstate commerce and in favor of local trade. *Prudential Ins. Co. v. Benjamin,* 328 U.S. at 434 (*see* cases cited at fns. 44 and 45). In so doing, Congress may either act alone or it may act in concert with the states. *Id.* In either case, the ordinary negative implications of the commerce clause as regards a state's power to regulate commerce are irrelevant. *Id.*

This lesson was reiterated by a unanimous Court as recently as the closing days of last term:

> Congress, of course, has power to regulate the flow of interstate commerce in ways that the States, acting independently, may not. And Congress, if it chooses, may exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 423-424 (1946) [other citations omitted].

*Lewis v. BT Investment Managers, Inc.*, No. 79-45, decided June 9, 1980.

*Prudential Ins. Co. v. Benjamin, supra,* and a case decided on its authority a week later, *Prudential Ins. Co. v. Hobbs,* 328 U.S. 822, it is respectfully submitted, control this case.

*Prudential Ins. Co. v. Benjamin* involved the power of Congress to validate a South Carolina statute which exacted a premiums tax from foreign insurance corporations when there was no similar levy against South Carolina corporations. The Court, after a thorough and carefully crafted discussion of Congress's power over interstate commerce, its ability to exercise that power in coordination with the states, and its exercise thereof in the McCarran Act, 59 Stat. 33, 15 U.S.C. §§ 1011-

1015, declared that the tax could not violate the commerce clause, in letter or spirit, whether or not the tax was in fact discriminatory:[1]

> In this light the argument that the degree of discrimination which South Carolina's tax has involved, *if any,* puts it beyond the power of government to continue must fall of its own weight. [Emphasis added.]

328 U.S. at 436.

The essential holding of the case was that Congress, through the McCarran Act, had exercised its power under the commerce clause "in complete coordination" (328 U.S. at 435) with the states to sustain extant and future state regulation and taxation of insurance. Whether that state regulation and taxation promoted interstate commerce or discriminated against it (or, for that matter, prohibited it) was irrelevant because each such regulation or tax (or at least those of a type known to the Congress which enacted the McCarran Act[2]) had the full,

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[1] The Supreme Court of South Carolina apparently concluded that Prudential had failed to show that the premiums tax, levied solely against foreign corporations, was discriminatory "in net effect" since property taxes paid by domestic corporations had not been considered. *See Prudential Ins. Co. v. Murphy*, 207 S.C. 324, 331, 355 S.E.2d 586, 588 (1945). The basis of the conclusion appears to have been that because domestic corporations were more likely to have greater amounts of property in South Carolina subject to South Carolina property taxes than were foreign corporations, it was possible that the total tax collected by South Carolina from domestic corporations and foreign corporations was more nearly equal than it appeared from consideration of the premiums tax alone. As its opinion makes clear, this Court concluded that this finding was irrelevant.

[2] Of course the existence of retaliatory insurance taxes was well known to the 79th Congress. They were a long established part of the fabric of American state taxes on insurance companies. In the period immediately following this Court's *Southeastern Underwriters* decision, 322 U.S. 533, but before the enactment of the McCarran Act, 13 or 14 states repealed their retaliatory laws. J. Pyle, "The Metamorphic Retaliatory Tax Law (What Lies Ahead?)," 23 Ass'n of Life Insurance Counsel Proc. 857, 897 (1972); G. Pelletier, "Insurance Retaliatory Laws," 39 Notre Dame Lawyer 243, 249 (1964). As of April 1945, 34 states had some form of insurance retaliatory tax. Note, "Congressional Consent to Discriminatory State Legislation," 45 Colum. L. Rev. 927, 930, fn. 15 (1945). Thus, it is clear that restoring the status quo to retaliatory tax legislation was a part of the over-all McCarran Act agenda.

combined force of the federal and the state governments behind it, a combined force that, because of the very fact of the combination, makes it impervious to commerce clause infirmities (unless, of course, the subject of the regulation or tax is not commerce).

*Prudential Ins. Co. v. Hobbs*, 328 U.S. 822, *reh. denied*, 329 U.S. 819, dealt with a similar attack by foreign corporations on the insurance tax scheme of Kansas. The tax primarily at issue in that case was what has been characterized by the courts below in this case as a "comparative" retaliatory tax, a tax whose retaliatory effect is felt so long as the foreign state's rate is higher than the legislating state's, without regard to discrimination by the foreign state between its own domestic corporations and others. Not coincidentally, this Kansas retaliatory tax has been held by the highest authority in California to be "substantially identical" to California Insurance Code § 685, the tax at issue here. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 99 Cal.App.3d 410, 424, fn. 3, 159 Cal.Rptr. 539, 542, fn. 3 (1979) (J.A. at 89); *Atlantic Ins. Co. v. State Bd. of Equalization*, 255 Cal.App.2d 1, 10, 62 Cal.Rptr. 784 (1967). In *Prudential v. Hobbs* the Court upheld the retaliatory tax against a commerce clause attack in a *per curiam* affirmance of the Kansas court, relying upon *Prudential v. Benjamin*. Like *Prudential v. Benjamin*, therefore, *Prudential v. Hobbs* stands for the proposition, in the retaliatory insurance tax realm, that, discriminatory or not, state taxes on the business of insurance are granted virtual commerce clause immunity by the McCarran Act.

Finally, it is clear that this was the understanding and intention of those who drafted and enacted the McCarran Act in 1945. During the course of the debate, Senator Ferguson of Michigan, one of the sponsors of the bill, said:

> The language of the bill makes clear the purpose of the legislation, that the taxation problem will be taken care of, and there will be no excuse for paying under protest or not paying at all.

91 Cong. Rec. at 504 (1945). A short time later in the debate, Senator O'Mahoney of Wyoming said:

> We are extending to the States, complete immunity for their State tax law. . . .

91 Cong. Rec. at 509 (1945). And, finally, Senator McCarran himself most succinctly stated the Act's purpose:

> In other words, we give to the States no more powers than those they previously had, *and we take none away from them.*

91 Cong. Rec. at 1442 (1945); emphasis added.

By "previously" it is clear that the Senator meant previous to the Court's decision in *United States v. Southeastern Underwriters Ass'n,* 322 U.S. 533. Prior to that decision, it was "generally accepted doctrine" (*see* S. Rep. No. 20, 79th Cong., 1st Sess. (1945)) that the business of insurance was not "commerce" and thus it, and taxes on it, were not affected by the commerce clause.

Congress clearly thought that it was validating taxes exactly like the tax involved in this case. There is no reason why Congress would not have the valid constitutional power to carry out that intention. That is what this Court held in *Prudential Ins. Co. v. Benjamin,* and specifically with respect to a retaliatory tax in *Prudential Ins. Co. v. Hobbs.* There is no reason now to depart from those contemporaneous and carefully considered decisions.

## II. The California Retaliatory Tax Is Not Invalid Under the Equal Protection Clause.

Once Congress, in complete coordination with California, has acted to sustain the tax, reinforcing it by the exercise of all the legislative power of government residing in our federal system, substantial constitutional infirmity must be found before this joint effort can be invalidated (*Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 435-436):

> Clear and gross must be the evil which would nullify such an exertion, one which could arise only by exceeding beyond cavil some explicit and compelling limitation im-

posed by a constitutional provision or provisions designed and intended to outlaw the action taken entirely from our constitutional framework.

The equal protection clause was not the explicit, compelling limitation the Court had in mind. An equal protection clause argument was made in *Prudential Ins. Co. v. Benjamin*, 328 U.S. at 437. With respect to this and related arguments, this Court said (328 U.S. at 437-438):

> These arguments may be summarily disposed of. As for the due process contention, it was settled by a long line of authorities prior to the *Southeastern* decision, that the similar provision of the Fourteenth Amendment, *as well as that requiring equal protection of the laws,* does not forbid the states to lay and collect such a tax as South Carolina's. Certainly the Fifth Amendment does not more narrowly confine the power of Congress; nor do it and the Fourteenth taken together accomplish such a restriction upon the coordinated exercise of power by the Congress and the states. [Footnote omitted; emphasis added.]

Thus, it is clear that the California statute does not exceed "beyond cavil" the equal protection clause proscription. The question was recognized and settled in the *Prudential Insurance* cases, and the California statute here is no more discriminatory than the South Carolina statute before the Court in *Prudential v. Benjamin* or the Kansas statute involved in *Prudential v. Hobbs.* There is no acceptable basis for upsetting what has been settled law and practice in this fiscal-commercial area for thirty-five years since the McCarran Act, and for well over a hundred years in the business and financial practice of the country. *See* Note, "Congressional Consent to Discriminatory State Legislation," 45 Colum. L. Rev. 927 (1945).[3]

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[3] *See also Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391; *Finch & Co. v. McKittrick*, 305 U.S. 395. These opinions are among the last written by Mr. Justice Brandeis, and evidence his usual penetrating thought. They are a virtually contemporaneous construction of the Twenty-First Amendment, and they are an added showing that when the protection of the commerce clause is taken away, rational discriminatory regulations present no substantial question under other provisions of the constitution, including the equal protection clause.

### A. It Has Never Been Held That a State May Not Exact From a Foreign Corporation as a Condition to Continued Admission to Do Business the Payment of a Tax Measured by the Business Done Within Its Borders.

Appellant and *amici* in support of appellant do not perceive the fine though pivotal distinctions in cases such as *Asbury Hospital v. Cass County,* 326 U.S. 207, *Lincoln Life Ins. Co. v. Read,* 325 U.S. 673, *Hanover Fire Ins. Co. v. Harding,* 272 U.S. 494, and *Philadelphia Fire Ass'n v. New York,* 119 U.S. 110 (Brief for the Appellant at 14-17; Brief for the United States as *Amicus Curiae* at 9; Brief *Amicus Curiae* in Support of Appellant on Behalf of the Life Insurance Council of New York [hereinafter "LICONY Brief"] at 6-7). Those cases do not stand for the proposition that a state's grant of a conditional, *indefinite* license to conduct business immediately brings a foreign corporation into the same class, for Fourteenth Amendment purposes, as domestic corporations. *Lincoln,* 325 U.S. at 676; *Hanover,* 272 U.S. at 515. As is clear from *Lincoln,* 325 U.S. at 676-678, the fact that a license is of an *indefinite* term is not relevant; it is the fact that a license grants a foreign corporation an *unequivocal* or *unconditional* right to conduct business in the discriminating state that vaults that corporation into the same class occupied by domestic corporations.[4]

In the instant case, California has granted no such unconditional or unequivocal license to appellant. Indeed, appellant's certificate to conduct business in California states that such admission is "expressly conditioned" upon conformance with California taxing laws as in effect upon initial entry and as amended (J.A. at 43). Accordingly, to paraphrase the Court in *Lincoln,* 325 U.S. at 676, appellant, unlike the foreign corporation in *Hanover, supra,* never obtained from California an unequivocal license to do business there; it agreed to pay for the retention of its license such taxes as California might impose.

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[4] *Asbury Hospital v. Cass County,* 326 U.S. at 212, goes even further by holding that state legislation imposing greater burdens on foreign corporations than those to which they were subject at the time of their entry is acceptable on the ground that the state might exclude the foreign corporations altogether at a later date. *See also Baltic Mining Co. v. Massachusetts,* 231 U.S. 68. Application of this broad rule, however, is unnecessary in this case.

Because payment of the tax at issue here is a prerequisite for retention of its license, appellant is not admitted within the state or within its jurisdiction until it pays such license fee. It is outside, at the threshold, seeking admission. *Lincoln*, 325 U.S. at 678; *Philadelphia Fire Ass'n*, 119 U.S. at 119. Indeed, in another case involving the application of the California insurance retaliatory tax to this very appellant, the California Court of Appeal precisely so held. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 4 Cal.App.3d 21, 31, 84 Cal.Rptr. 88, 94-95 (1970). "And the equal protection clause does not require the tax or rate of tax exacted from a foreign corporation as a condition of entry to be the same as that imposed on domestic corporations." *Lincoln*, 325 U.S. at 678; *Hanover*, 272 U.S. at 510-511.

To employ the equal protection clause to defeat the California retaliatory tax not only runs roughshod over this basic principle but requires the overruling of *Philadelphia Fire Ass'n, supra*. That case, expressly relied upon in and explained by *Lincoln v. Read, supra*, and *Prudential v. Benjamin*, 328 U.S. at 438, fn. 50, explicitly upheld, against an equal protection attack, the imposition of a "comparative" retaliatory insurance tax provision such as the tax at issue here upon a corporation that had already gained admission to the retaliating state. The New York retaliatory tax upheld in that case lay dormant as regards Pennsylvania corporations until Pennsylvania imposed a premiums tax applicable to New York insurance companies operating in Pennsylvania that was higher than New York's tax. This occurred many years after the appellant Pennsylvania corporation first qualified to do business in New York. The retaliatory levy, so awakened, was not an unconstitutional discrimination, however, because the original New York retaliatory law which provided for its possible later triggering by Pennsylvania in effect *conditioned* the original grant of a license to the Pennsylvania corporation.

In this case, appellant is in an identical if not worse position. Subjection to some form or at least the constitutional threat of a California retaliatory tax conditioned appellant's license from the day it was first granted; it was not a dormant

condition awakened by the action of the legislature of another state after appellant had done business in California for years without feeling its threat.[5] Therefore, unless "the long established rule that a State may discriminate against foreign corporations by admitting them under more onerous conditions than it exacts from domestic companies [is to] go into the discard," *Lincoln,* 325 U.S. at 677, the imposition of the California tax on appellant must be upheld.

**B. The Classifications Established by the California Legislature to Secure Comity and to Promote Uniformity of Taxation Are Reasonable.**

Even if *Philadelphia Fire Ass'n, supra,* is to be overruled and *Lincoln v. Read, supra,* and *Asbury Hospital v. Cass County, supra,* disregarded, the California insurance retaliatory tax is not susceptible to attack on equal protection grounds because the classifications it draws are reasonable.

1. *In Taxation and Economic Regulation, Even More Than in Other Fields, State Legislatures Possess Wide Freedom in Classification.*

So long as "suspect classifications" or "fundamental rights" are not involved, a state possesses wide latitude in making classifications and drawing lines in distributing benefits and burdens through the legislative process. That discretion is at its broadest (and has long been so) where a state legislature describes classifications in the field of taxation and economic

[5] The California Constitution, Art. XIII, § 14-4/5, subdiv. (f)(3) has long provided for retaliatory insurance premiums taxes. Although the California constitutional provision regarding its retaliatory tax was changed slightly in 1964, the statutory provision (first enacted in 1873, Stats. 1873, Ch. 610, § 18, repealed in response to *U.S. v. Southeastern Underwriters,* Stats. 1945, Ch. 921, and then re-enacted as Insurance Code § 685 *et seq.* in 1959) was not. *Western & Southern Life Ins. Co. v. State Bd. of Equalization,* 99 Cal.App.3d 410, 413, 159 Cal.Rptr. 539, 541, (1979) (J.A. at 83). Because of the statute's conflict with the state constitution prior to 1964, however, Western & Southern, in other actions, successfully sued for a refund of retaliatory taxes assessed against it prior to 1964 (J.A. at 5). *See Western & Southern Life Ins. Co. v. State Bd. of Equalization,* 4 Cal.App.3d at 25, 84 Cal.Rptr. at 91 (1970).

regulation. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359; *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-527; *Madden v. Kentucky*, 309 U.S. 83, 88; *State Bd. of Tax Commissioners v. Jackson*, 283 U.S. 527, 537; *Citizens' Telephone Co. v. Fuller*, 229 U.S. 322, 329; *Bell's Gap R.R. v. Pennsylvania*, 134 U.S. 232, 237. As this Court stated in *Allied Stores of Ohio v. Bowers*, 358 U.S. at 526-527, and reiterated, in part, in *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. at 359-360:

> The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States in the exercise of their taxing power are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. . . . "To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." *Ohio Oil Co. v. Conway, supra*, 281 U.S. at 159.

As was shown above at pages 5-9, the California retaliatory tax, by virtue of the McCarran Act, 15 U.S.C. §§ 1011-1015, is a coordinated exercise of federal and state power over commerce. *Prudential v. Benjamin*, 328 U.S. at 433-436. This voluntarily cooperative effort of Congress and a state in taxing insurance premiums can hardly be one "trenching upon the prerogatives of the National Government." The question presented thus is distilled to the single question whether it appears from the application of the California retaliatory tax to appellant that California's legislature and the Congress together

have proceeded upon a rational basis or, instead, have resorted to a classification that is "palpably arbitrary." *Allied Stores of Ohio v. Bowers,* 358 U.S. at 530.

2. *The Classifications Drawn by the California Tax Must Be Upheld Unless No State of Facts Can Be Conceived Which Support Them.*

In making the determination whether the classifications made by the retaliatory tax are rational, "[t]he burden is on the one attacking the legislative arrangement to negative *every conceivable basis* which might support it." [Emphasis added.] *Madden v. Kentucky,* 309 U.S. at 88. If "any state of facts reasonably can be conceived that would sustain it," even though discriminatory, the classification must be upheld. *Allied Stores of Ohio v. Bowers,* 358 U.S. at 528.

In deciding whether "every conceivable basis" has been parried by appellant, the Court should be loath to judge the efficacy or even the ultimate fairness of the tax. As the Court stated in *State Bd. of Tax Commissioners v. Jackson,* 283 U.S. 527, 537-538, a case involving a tax which discriminated against chain stores:

> It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear.

As Mr. Justice Frankfurter once wrote, "Wise tax policy is one thing; constitutional prohibition quite another." *Newark Fire Ins. Co. v. State Bd. of Tax Appeals,* 307 U.S. 313, 323.

This reticence to "sit as a super-legislature," *see Colgate v. Harvey,* 296 U.S. 404, 441 (Brandeis, Stone, and Cardozo, JJ., *dissenting), overruled, Madden v. Kentucky,* 309 U.S. 83, 93, has long prevailed in this Court when it has been called upon to judge the validity of legislative classifications under the equal

protection clause. The Court has long heeded its own admonition, expressed in *Louisville & Nashville R. R. v. Barber Asphalt Co.*, 197 U.S. 430, 434, that "it is important for this court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness" and has wisely refused to read into its flexible and constantly developing Fourteenth Amendment jurisprudence a frozen and "lifeless logic."[6] *See, e.g., Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S. 580 (upholding discrimination favoring domestic corporation over foreign corporation).

3. *A Classification Scheme Discriminating Between Foreign and Domestic Corporations Does Not Necessarily Offend Equal Protection.*

Though not directly at issue here,[7] and despite appellant's claim that the contrary rule is "well established" (Brief for the Appellant at 18), classification based simply on a corporation's state of incorporation does not violate the equal protection clause. *Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S. 580. Indeed, discrimination both in favor of foreign corporations and against them has been upheld by this Court against equal protection assaults. *Metropolitan Casualty Ins. Co. v. Brownell, supra* (against); *Allied Stores of Ohio v. Bowers,* 358 U.S. 522 (in favor).

*Metropolitan Casualty Ins. Co., supra,* upheld an Indiana statute that discriminated against foreign insurance companies and in favor of domestic ones by forbidding the former to limit by agreement to less than three years the time within which suit might be brought against them on their contracts. A domestic

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[6] "Legislation is essentially empiric. It addresses itself to the more or less crude outside world and not to the neat, logical models of the mind. Classification is inherent in legislation; the Equal Protection Clause has not forbidden it. To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic." *Morey v. Doud,* 354 U.S. 457, 472 (Frankfurter and Harlan, JJ., *dissenting*), *overruled, New Orleans v. Dukes,* 427 U.S. 297, 306 ("*Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous.")

[7] *See* pages 19-22, *infra.*

corporation could set any reasonable limit it wished. The mere fact that Indiana distinguished between corporations solely on the basis of their state of incorporation (in order to favor its own), however, was not dispositive.

> The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made. [Citation omitted.] If those differences have any rational relationship to the legislative command, the discrimination is not forbidden. [Citations omitted.]

294 U.S. at 583. Because it was "not beyond the range of probability" that foreign companies were more likely than domestic companies to keep their funds, and maintain their business offices and their agencies for the settlement of claims outside of Indiana,[8] and because the Court "[could] not say that these considerations may not have moved the legislature to insist that a longer time should be given for bringing suit against foreign companies than [against domestic companies]," 294 U.S. at 585-586, the Court held the discrimination against foreign corporations valid under the equal protection clause.

*Allied Stores of Ohio v. Bowers,* 358 U.S. 522, is to like effect in a situation where foreign corporations are the beneficiaries of discriminatory classification between corporations based solely on their state of incorporation. In that case nonresidents were exempted from an Ohio *ad valorem* tax on warehoused merchandise (held for storage only) which Ohio corporations were forced to pay. Because "it may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing

[8] The Court itself stated, 294 U.S. at 583, 585, however, that there was no basis in the record, briefs, or arguments on which the Court could rely to make a determination that foreign corporations even were likely to keep their funds and maintain their businesses outside of Indiana, nor need there have been.

and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy," 358 U.S. at 528-529, the discriminatory foreign/domestic classification was upheld.[9]

Even in realms where, unlike the situation here, unacceptable burdens on interstate commerce might appear to be at issue, at least tangentially, such that the commerce clause might seem to cast its shadow across the Fourteenth Amendment, the Court has not been deterred from applying its ordinary "any conceivable basis" equal protection analysis in tax cases. In *Madden v. Kentucky,* 309 U.S. 83, an *ad valorem* tax levied against property owned by Kentucky citizens was five times greater on out-of-state bank deposits than on those kept in Kentucky. Despite its obvious impediment to the flowering of interstate banking this discrimination withstood an equal protection attack. Likewise, *Citizens National Bank v. Durr,* 257 U.S. 99, upheld against equal protection and commerce challenges an Ohio statute that taxed its citizens on the value of their membership on the New York Stock Exchange while exempting from taxation memberships on local exchanges.

Similarly, in *State Bd. of Tax Commissioners v. Jackson,* 283 U.S. 527, it was alleged that an annual license tax on stores

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[9] The fact that a foreign corporation was benefitted by the discrimination, *i.e.*, interstate commerce was encouraged, does not distinguish the case, for equal protection purposes at least, from *Metropolitan Casualty, supra,* where a foreign corporation was harmed (and interstate commerce discouraged). For equal protection purposes it is the rationality of the discriminatory classification alone that matters, not whether other policies inherent in other parts of the Constitution, such as the protection of interstate commerce in the absence of Congressional action (not relevant here by virtue of Congressional action, *see* pages 5-9, *supra*), might be involved. Here, where other Constitutional policies are, by act of Congress, explictly *not* involved, it is especially imperative not to let commerce clause considerations (that might appear pertinent were it not for that act of Congress) color the separate equal protection analysis.

*Hanover Fire Ins. Co. v. Harding,* 272 U.S. 494, and *Southern Ry. v. Greene,* 216 U.S. 400, are not to the contrary since each involved a discrimination against foreign corporations which could not be supported by any conceivable state of facts based on differences arising from differing places of incorporation. The discriminatory tax in each case appeared to be simply an exaction for raising revenues for maintenance of the government, *see, e.g.,* 272 U.S. at 497, the services of which were not required appreciably more by one class of corporation than by the other.

increasing progressively with the number of stores under the same general management or ownership, but which ignored income, sales or investment, was blatant discrimination against chain stores. It seems implicit in that opinion that discrimination against chain stores could result in *de facto* discrimination against foreign corporations and interstate commerce. But the great deference accorded state legislatures in making classifications for taxing purposes made it impossible for the Court to declare the classification arbitrary and unreasonable and thus the equal protection challenge was denied.

4. *The Classification Scheme of the Retaliatory Tax Is Intended to Secure Comity or Reciprocal Treatment and Is, Therefore, Rational and Not Arbitrary.*

Even simple and plain discrimination against all foreign corporations and in favor of domestic corporations, as shown above, is not a *per se* denial of equal protection; the domestic versus foreign classification may readily be justified. Were a California tax to draw such a distinction, we submit that it too could be readily justified. *Cf. Prudential v. Benjamin, supra; Metropolitan Casualty, supra.*

The most cursory analysis of the operation and goals of the California retaliatory tax reveals, however, that the retaliatory tax does not simply favor domestic corporations over all foreign corporations. The distinctions it draws are between corporations from states which impose premium taxes on California insurers at a rate higher than California's, on the one hand, and all other insurers, foreign or domestic, on the other. As appellant itself points out (Brief for Appellant at 13) the retaliatory tax applies only to foreign insurers incorporated in the 17 states which place higher tax burdens upon insurers than California. Insurers from California and 32 other states, therefore, are treated the same.[10]

The operative fact that puts appellant into the disfavored class, therefore, is not appellant's Ohio incorporation, but rather

[10] This distinguishes this case from *WHYY, Inc. v. Glassboro*, 393 U.S. 117, where a New Jersey statute providing a tax exemption for non-profit corporations discriminated against *all* foreign corporations for no apparent reason more weighty than administrative ease.

Ohio's higher premiums tax. If Ohio were to reduce its rate to match California's (at least for California corporations) appellant would no longer be subject to any greater burden than that imposed on the insurers from California and 32 other states. The solution for any harm suffered by appellant, therefore, lies with the Ohio legislature. As this Court said in a case construing the privileges and immunities clause of the Fourteenth Amendment, *Austin v. New Hampshire,* 420 U.S. 656, 668:

> Nor... can the constitutionality of one State's statutes affecting nonresidents depend upon the present configuration of the statutes of another State.

The source of appellant's injury aside, the fact that the "discrimination" inherent in the retaliatory tax is limited to and focused upon a small and discreet class carved out of the class of all foreign corporations is essential to an understanding of the goal of the retaliatory tax and the rationality of the classification drawn to achieve that goal. The thrust of the retaliatory tax is not simply to favor local insurance companies while penalizing foreign insurers. Were that the goal California would impose an additional tax on corporations from 49 states, not just 17.

The purpose of the tax and the classification it draws is to secure equitable or favorable treatment for California corporations doing business in other states; in the words of the California Court of Appeal, "to secure ... even-handed treatment by the Legislatures of other states," *Western & Southern Ins. Co. v. State Bd. of Equalization,* 4 Cal. App. 3d at 34, 84 Cal. Rptr. at 96 (1970) (construing the post-1964 "comparative" retaliatory tax), and "to secure reciprocity," *Atlantic Ins. Co. v. State Bd. of Equalization,* 255 Cal. App. 2d 1, 62 Cal. Rptr. 784, 793 (1967), *appeal dismissed, cert. denied,* 390 U.S. 529. The retaliatory tax "is designed to achieve uniformity of treatment and not to discriminate." *Id.*

Other courts and commentators construing identical or similar statutes have agreed. *Occidental Life Ins. Co. v. Commonwealth,* 6 Pa. Comwlth. 532, 295 A.2d 853, 854 (1972) ("The purpose of a retaliatory charge is to bring about equality

of treatment."); *Republic Ins. Co. v. Commissioner of Taxation,* 272 Minn. 325, 138 N.W. 2d 776 (1965); *Commissioner of Ins. v. Equity General Ins. Co.,* 346 Mass. 233, 191 N.E.2d 139, 142 (1963); In re *Insurance Tax Cases, Aetna Ins. Co. v. Hobbs,* 160 Kan. 300, 303-304, 161 P.2d 726, 730 (1945), *aff'd sub nom. Prudential Ins. Co. v. Hobbs,* 328 U.S. 822 (*per curiam*)[11]; *Pacific Mutual Life Ins. Co. v. Lowe,* 354 Ill. 398, 188 N.E. 436 (1933); *Life and Casualty Ins. Co. v. Coleman,* 233 Ky. 350, 353, 25 S.W. 2d 748, 749 (1930); *Clay v. Dixie Fire Ins. Co.,* 168 Ky. 315, 181 S.W. 1123, 1125 (1916); 52 Harv.L.Rev. 172 (1938); Couch, ON INSURANCE (2d), § 21:92 and cases therein cited; 19 Appleman, INSURANCE LAW AND PRACTICE, § 10352 (1946, Supp. 1979).

This desire for "even-handed treatment" is not only the paramount, it is the only purpose of a retaliatory tax. Unlike the tax at issue in *Hanover Fire Ins. Co. v. Harding,* 272 U.S. 494, a retaliatory tax does not have even an ancillary revenue-raising purpose.

> In fact, its success might be said to depend on how little is collected under its terms rather than how much. It is designed to bring about equality of treatment between domestic and foreign corporations and to break down interstate barriers.

*Commonwealth v. Fireman's Fund Ins. Co.,* 369 Pa. 560, 564, 87 A.2d 255, 258 (1952). *See also Pacific Mutual Life Ins. Co. v. State,* 161 Wash. 135, 296 P. 813 (1931). Because the purpose

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[11] The Kansas Supreme Court, in construing a tax which the California Court of Appeal has held "substantially identical" to the tax at issue here (*see* page 8, *supra*) discussed one of its earlier holdings:

> In the opinion [*Phoenix Insurance Co. v. Welch* ] (29 Kan. 674, 675) the court took note of the fact that the provision in question is referred to in insurance circles as "a retaliatory" clause, and said:
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> "It seems to us more justly to be deemed a provision for reciprocity. It says, in effect, that while we welcome all insurance corporations of other states to the transaction of business within our limits, we insist upon a like welcome elsewhere .... It is, in brief, an appeal for comity; a demand for equality. As such, it is manifestly fair and just. It arouses no sense of injustice, and simply says to every other state in the Union: 'We will meet you on the basis of equality and comity, and will treat you as you treat us.' "

of California's retaliatory tax is to secure reciprocity and thus "break down interstate barriers," it is submitted that the discrimination against corporations from the states, such as Ohio, from whom California is attempting to secure reciprocity, is rational. That this discrimination occasionally favors domestic corporations over some foreign corporations does not render the classification scheme arbitrary and irrational. Indeed, it would be irrational not to discriminate on just the sort of basis adopted by California.[12]

For these same reasons, the distinction between "comparative" or "discriminatory" retaliatory laws cannot be dispositive. Comity, which implies that the foreign state not merely end discrimination against the legislating state's corporations but accept the legislating state's own standards as controlling for that state's corporations, is the guiding principle in either case.

5. *The California Retaliatory Tax Is Typical of Legislation Which Has Been Developed in the "Laboratories of the States"; It Is No Different Than Many Other Reciprocal and Retaliatory Statutes Designed to Make the Federal System Work More Smoothly.*

The attempts of states to secure "even-handed treatment" for their citizens and corporations living or operating in other states by securing treatment not necessarily enjoyed by citizens or corporations in those other states but deemed ordinary or

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[12] *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, is not to the contrary. In that case Ohio argued that an alleged "reciprocity" provision whereby the intangibles of its residents were offered up to the taxing authorities of other states saved an Ohio *ad valorem* tax on intangibles that reached only nonresidents and exempted residents. This so-called "reciprocity" offer (which, the Court pointedly noted, was accepted by no state) was very different from the offer California makes here. In the *Wheeling Steel* situation, unlike the retaliatory tax scheme here, no other state could rescue its residents from the Ohio nonresident intangibles tax by altering its taxation of Ohioans. The Ohio tax on nonresidents was immutable. Ohio was not attempting to secure its citizens and residents reciprocal advantages; it was merely forsaking one revenue base for a larger one. Here, California's statute can be rendered wholly inoperative (as it already is to insurers from 32 states) when California's very real offer of reciprocity is accepted.

standard by the legislating state, are legion. While most examples are so-called "reciprocal" statutes, where the promise of favorable discrimination is exchanged in return for a like promise, several are "retaliatory," as the tax here is and as are insurance premiums taxes in most states (*See* LICONY Brief, Appendices B and C), where a penalty is threatened unless a benefit is granted.[13]

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[13] The distinction between "reciprocal" and "retaliatory" statutes is quite blurred. Because a "retaliatory" law such as is involved here provides that the so-called retaliation ends when a foreign state grants the benefit desired, it may also be perceived of as a "reciprocating retaliatory" law.

Because of this fact, the attempt by *amicus* Life Insurance Council of New York to distinguish retaliatory statutes from reciprocal statutes (LICONY Brief, at 10-14) is misleading. *Amicus* fails to point out that the thrust of each is identical. Both types of statutes intend to secure comity. Both types of statutes do so by invoking foreign versus domestic discrimination. In a retaliatory scheme (of the sort involved here, *i.e.*, a reciprocating retaliatory law) the foreign corporation or citizen is burdened more than the domestic only until the foreign state grants the benefit desired. At that point, the foreign state either lowers the tax rate applicable to all corporations, thus ending all discrimination, or begins to discriminate in favor of the legislating state's citizens or corporations and against its own. In the classic reciprocal case, discrimination by the legislating state against its own corporations and citizens in favor of those from a foreign state is offered in exchange for like discrimination by the foreign state. In the retaliatory case the legislating state ends the discrimination when the desired comity is afforded; in the classic reciprocal case the legislating state begins to discriminate when the desired comity is afforded. The only real difference is whether coercive, or persuasive and enticing, means are used to foster the desired mutual friendship. For equal protection purposes, the difference between coercive or persuasive means, the carrot or the stick, hardly seems dispositive since discriminatory classification exists in either.

Nor is "the essential difference" between reciprocal and retaliatory statutes, contrary to *amicus's* argument (LICONY brief at 13), "that in the absence of the so-called reciprocal feature the California retaliatory tax would clearly run afoul of the Equal Protection Clause whereas [benefits] that are granted to out-of-state charities or nonresidents on a reciprocal basis could be denied altogether." *Amicus* misses the point. The "so-called reciprocal feature" of the retaliatory tax is its very life-breath. The whole and only point of the tax is to act on corporations from states that do not reciprocate by favoring California corporations (or by taxing all insurers at the lower California rate). If a foreign state does not tax California insurers more than California does (*i.e.*, grants California insurers the benefit sought) there is no

(*footnote continues*)

Several states have retaliatory provisions demanding favorable treatment for their domestic building and loan or savings and loan associations.[14] A typical provision is found in South Dakota Cod. Laws Ann., section 52-11-7 (1980 Rev.):

> 52-11-7. *Laws of other states affecting South Dakota associations—Retaliatory statute applicable to foreign associations operating in this state.*
>
> When the laws of any other state impose taxes, fines, penalties, licenses, fees, deposits of money or securities or other obligations on savings and loan associations of this state doing business in such other state, as long as such laws continue in force the same obligations and prohibitions shall be imposed on the foreign associations doing business in this state and upon their agents herein.

Though some states term these statutes "reciprocal" they are no different in effect than the insurance "reciprocating retaliatory" law at issue here. The message is simple: we shall treat your corporations just as you treat ours. *See, e.g.*, Wash. Rev. Code, section 33.32.060:

> 33.32.060 *Reciprocity.* No foreign savings and loan association shall be permitted to do business in this state on more favorable terms and conditions than the associations organized under the laws of this state are permitted to do business in the state in which such foreign association or corporation is organized.

Some states have far-reaching retaliatory provisions in their professional licensing statutes. Iowa, for instance, requires

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(*footnote continued*)

retaliatory tax imposed; without the "so-called reciprocal feature," therefore, there is no retaliatory tax. This alleged "essential difference" distinguishing reciprocal from reciprocating retaliatory laws is mere abstraction and adds nothing to the analysis of the rationality of classifications in a retaliatory statute. *See, e.g., Employers Casualty Co. v. Hobbs,* 152 Kan. 815, 107 P.2d 715 (1940).

[14] Iowa Code Ann., § 534.62 (West Supp. 1980-81); Montana Rev. Codes Ann., § 7-135 (2d Repl. Vol. 1968); South Dakota Cod. Laws Ann., § 52-11-7 (1980); Vermont Stat. Ann., § 1941 (1970); Wash. Revised Code, § 33.32.060 (1979); Wisc. Stat. Ann., §§ 215.26, 215.33(b) (1980).

that any person licensed in another state wishing to practice a licensed profession in Iowa must meet every requirement and suffer every disability placed on Iowa licensees practicing in that other state. Iowa Code Ann. §§ 147.46, 147.52 (West 1972). To similar effect is Nebraska Rev. Stat. § 71-142 (1976 Reissue). Ohio has a retaliatory liquor tax with a similar impact. Page's Ohio Rev. Code §§ 4301.54, 4301.55 (1973).

Reciprocal statutes are too numerous to catalogue. In the field of taxation alone there are many. In addition to the reciprocal statutes discussed by *amicus* Life Insurance Council of New York (LICONY Brief, at 10-12) there are reciprocal tax exemptions such as South Carolina's provision which imposes a tax on out-of-state agricultural products but exempts them from all taxes and licenses provided the state from which such products came accords a similar privilege to the sales of South Carolina products within their boundaries. S.C. Code §§ 12-37-340, -350, -360 (1976); *see* 59 Harv.L.Rev. 1324 (1946). Like many "reciprocal" statutes, however, South Carolina's offer of reciprocity is really no more than an offer to end discrimination or retaliation against foreign products and not the offer of a mere favor for a favor since South Carolina's domestic agricultural products are wholly and unconditionally exempt from the South Carolina tax.

In addition to reciprocal tax benefits, many states' licensing statutes offer reciprocity. Lawyers, dentists, beauticians, and many types of licensed tradesmen may be admitted to practice in a state other than the one in which they originally qualified (though, perhaps, additional requirements, such as a minimum practice period, may be imposed) so long as that state returns the favor for licensed tradesmen of the second state.

Retaliatory and reciprocal statutes, it is clear from the briefest perusal of state codes, play an essential, widespread and long-accepted role in interstate cooperation. Their simplicity provides a path towards relative national uniformity, where appropriate, without resorting to the time-consuming complexity of fashioning a multitude of interstate compacts and without attracting the detailed involvement of the federal government. They are an accepted and essential way of life in

accommodating the need and desire for interstate harmony in our federal system. To rent this old but tightly woven fabric of interstate cooperation for the sake of imposing a federal "system of delusive exactness" where it does not belong would be a mistake.

6. *The Classifications Drawn by the California Retaliatory Tax Are Reasonably Designed To Accomplish Its Purpose; No Proof That the Tax Is Successful in Accomplishing Its Purpose Is Necessary.*

Given the purpose of the retaliatory law, it is obvious that the means chosen to accomplish that purpose is a rational one. In order for California to secure comity for its domestic insurers which operate in other states, the least discriminatory, yet effective, means it may employ is to penalize corporations from states with higher rates by exactly the amount by which those higher rates exceed California's. The closer to comity the other states move, the less the penalty exacted from each such state's corporations. The coercive or inducing effect is exactly tailored to the result desired.

Not only is it rational to suppose that, in this manner, the California retaliatory tax could gain legitimate benefits for California corporations, but it is also rational to suppose that the existence of a nationwide state retaliatory tax system could help achieve more generally uniform and reasonable premiums tax rates in all states. Indeed, it is not unlikely that the local insurance lobby will counter any proposal before a state legislature to raise insurance premiums tax rates radically by pointing out that, because of reciprocating retaliatory taxes, any increased revenues for the legislating state might be dwarfed by the resulting increased taxes thus made available to 40 or more other states. When the extraterritorial impact of such a rate increase is pointed out, and the implications that impact may have regarding the continued location of domestic insurance companies in the legislating state are realized, it is not irrational to conclude that a state legislature, if not moved to reduce rates to the national norm, will at least hesitate in raising them.

*Amicus* for appellant, The Life Insurance Council of New York, takes appellee to task, however, because California's

attempt to achieve comity for its insurers has not been 100% successful. (LICONY Brief, at 19-26.) This argument is not persuasive for at least two reasons.

First, California's attempt to achieve comity for its insurers has achieved, relatively speaking, remarkable success. By appellant's own count, only the insurers from 17 states are still subject to the retaliatory tax. (Brief for the Appellant at 13.) Thirty-two states afford California insurers the same or better treatment than that which California offers. Indeed, even if every state's insurance retaliatory tax were at issue, the remarkable relative uniformity of state taxation of premiums collected by foreign insurers (Appendix B to the LICONY Brief reveals that most rates hover around 2%) bespeaks the efficacy of the retaliatory tax laws in effect in nearly every state. *See Atlantic Ins. Co. v. State Bd. of Equalization, supra,* 62 Cal.Rptr. at 793.

Second, the efficacy of California's attempt to secure reciprocity need not be shown. As described above at pages 13-16, in the tax and economic fields if any state of facts reasonably can be conceived that would sustain the rationality of the classification, then even clearly discriminatory classification can withstand an equal protection attack. Even the fact that California might have furthered its underlying purpose more artfully, more directly, or more completely (a fact we do not concede) does not warrant a conclusion that the method it chose was unconstitutional. *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 813. In fact, so long as California's underlying assumption (that a contingent penalty exacted from Ohio insurers might induce Ohio to eliminate the contingency generating that penalty) is not irrational, California need not offer a scintilla of factual support for its assumption. *Hughes v. Alexandria Scrap Corp.,* 426 U.S. at 812; *Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S. at 583.[15]

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[15] As Professor Tribe summarized the showing necessary to support the "any conceivable basis" test of *Allied Stores of Ohio v. Bowers,* 358 U.S. at 528:

> This remarkable deference to state objectives has operated in the sphere of economic regulation quite apart from whether the conceivable "state of facts" (1) actually exists, (2) would convincingly justify the

(*footnote continues*)

7. *Congress Provided An Imprimatur of Rationality By Ratifying State Retaliatory Taxation of Insurance.*

At least in the realm of suspect classifications or fundamental rights, Congress may not authorize the states to violate the equal protection clause. *Shapiro v. Thompson,* 394 U.S. 618, 641. It may, however, by appropriate legislation, enforce the Fourteenth Amendment's guarantee of equal protection. Section 5 of the Fourteenth Amendment. In so doing, Congress may bring its specially informed legislative competence to bear to give shape and definition to the rights protected by the Fourteenth Amendment. *Katzenbach v. Morgan,* 384 U.S. 641, 648. While Congress, of course, does not have the final say as to what constitutes a rational classification for equal protection purposes, *cf. State Bd. of Ins. v. Todd Shipyards Corp.,* 370 U.S. 451, 457 ("Congress . . . does not have the final say as to what constitutes due process . . . ."), we submit that the McCarran Act gives an imprimatur of Congressional approval to the classification drawn by insurance retaliatory taxes and, therefore, those classification schemes should be accorded even more deference than usual.

As pointed out at footnote 2, page 7 above, numerous states had insurance retaliatory taxes at the time the McCarran Act was enacted, and had had them for many years. As is clear from floor debate and the published reports on that Act, one of the major thrusts of the Act was to permit each state to continue to collect the taxes it had long assessed against insurance companies on business within its borders, thus overcoming the objection that such taxes were unconstitutional after *United States v. Southeastern Underwriters Ass'n,* 322 U.S. 533. Since retaliatory taxation was an established part of the scheme of state taxation explicitly sanctioned, Congress, to the extent it may, gave the classification drawn thereby an imprimatur of rationality. Surely this was included in Senator McCarran's

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(*footnote continued*)

classification if it did exist, or (3) has ever been urged in the classification's defense by those who either promulgated it or have argued in its support.

L. Tribe, AMERICAN CONSTITUTIONAL LAW, § 16-3 (1978).

authoritative statement that "[w]e give to the states no more powers than they previously had, and *we take none from them,*" 91 Cong. Rec. at 1442 (1945); emphasis added. *See* p. 9, above.[16]

## CONCLUSION

The Court's natural bias in favor of "free trade" among the states, a legitimate bias when Congress is silent regarding the regulation of the "commerce" involved, has no place in this case. Congress, through the McCarran Act, has removed any negative commerce clause implications that might have pervaded the analysis of the constitutionality of state retaliatory taxes. *Prudential v. Benjamin, supra; Prudential v. Hobbs, supra.*

Once freed of that orientation, sound equal protection analysis must also validate the tax at issue here. Like any reciprocal statute, the California insurance retaliatory tax legitimately seeks to encourage the several states not to tax California insurers at rates higher than California imposes on them, and which it offers to all insurers; it is a request for comity. The fact that the inducement offered is through a penalty rather than a reward, apart from commerce clause principles that have no bearing here, is irrelevant. The classification the statute makes is essential to its legitimate purpose and is, therefore, rational.

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[16] The effect of the McCarran Act in this area is much the same as that of the Twenty-First Amendment with respect to the powers of the states over intoxicating liquor. *See Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U.S. 391; *Finch & Co. v. McKittrick,* 305 U.S. 395, already cited at fn. 3, above.

The California statute violates neither the commerce clause nor the equal protection clause of the Federal constitution. For these reasons, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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